No. 96-386

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DAVID R. HABERBUSH, Chapter 7 Trustee,
Petitioner,

vs.

CLARK OIL TRADING COMPANY; NIC, INC.; GIC, INC.; PAUL A. NOVELLY; LAWRENCE ALTMANSBERGER; and SAMUEL R. GOLDSTEIN,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Although Petitioner purports to pose a single question for review, the Petition in fact presents for review two separate questions of statutory construction under former 11 U.S.C. § 546(a)(1) as it existed before its amendment in 1994:

1. In those circuits that construe the two-year statute of limitations set forth in former 11 U.S.C. § 546(a)(1) to apply to a debtor in possession as well as to an appointed trustee, does a Chapter 7 trustee succeeding a debtor in possession receive the benefit of a new two-year limitations period or merely the remainder of the debtor in possession's two-year limitations period?

2. If a Chapter 7 trustee succeeding a debtor in possession receives the benefit of a new two-year limitations period for avoidance actions, does the new two-year limitations period commence when the Chapter 7 trustee is first appointed as interim trustee or when an initial meeting of creditors pursuant to 11 U.S.C. § 341(a) fails to result in the election of a different individual to serve as Chapter 7 trustee?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

The parties listed on the caption of Respondents' Opposition Brief are parties to an adversary proceeding that was commenced by Petitioner as trustee of a Chapter 7 debtor, Sahuaro Petroleum & Asphalt Company, an Arizona corporation (the "Debtor").

When the Debtor filed for bankruptcy protection in 1991, it was a wholly-owned subsidiary of Edgington Oil Company. Respondents do not know whether the Debtor has any interest in any nonwholly-owned subsidiaries.

Respondents NIC, Inc. and GIC, Inc. are Missouri corporations that are themselves wholly owned by Apex Oil Company, Inc., also a Missouri corporation. NIC, Inc. and GIC, Inc. each holds a 50 percent interest in Respondent Clark Oil Trading Company, a Missouri partnership. Clark Oil Trading Company holds a 66.67 percent interest in New York Brownstone Associates, a New York partnership.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The memorandum opinion of the court of appeals affirming the decision of the district court (Pet. App. at 24-26) is unreported, but may be found at 1996 U.S. App. LEXIS 11047 (9th Cir. 1996). The district court's order reversing the bankruptcy court's denial of Respondents' Motion to Dismiss is reported at 170 B.R. 689. The bankruptcy court, in denying Respondents' original Motion to Dismiss, issued no opinion. (Pet. App. at 38-39.)

STATUTE INVOLVED

This case involves 11 U.S.C. § 546(a) prior to its amendment in 1994, which prior statute stated, in relevant part:

> (a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of —
>
> (1) two years after the appointment of a trustee under section 702, 1104, 1163, 1302, or 1202 of this title . . . .

11 U.S.C. § 546(a) (1993).[1]

FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

On March 21, 1991, the Debtor filed a petition for relief under chapter 11 ("Chapter 11") of title 11 of the

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[1] The Bankruptcy Reform Act of 1994, 108 Stat. 4106, effective October 22, 1994, amended 11 U.S.C. § 546(a) so that it now provides, in relevant part:

> (a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of —
>
> (1) the later of —
>
> (A) 2 years after the entry of the order for relief; or
>
> (B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A) . . . .

United States Code (the "Bankruptcy Code").[2] (Pet. App. at 29.) The bankruptcy court appointed no Chapter 11 trustee, and the debtor in possession thus conducted the business of the Debtor. (Pet. at 3.)

On September 5, 1991, the Debtor's Chapter 11 case was converted to one under chapter 7 ("Chapter 7") of the Bankruptcy Code.

On September 9, 1991, Petitioner was appointed the interim Chapter 7 trustee. (Pet. App. at 29 n.1.)

On November 6, 1991, the United States Trustee conducted a meeting of creditors pursuant to Bankruptcy Code § 341(a) (the "§ 341(a) Meeting"). At the § 341(a) Meeting, the Debtor's creditors did not request an election for a new Chapter 7 trustee and none was held; accordingly, Petitioner continued to serve as Chapter 7 trustee.[3] (Pet. App. at 41.)

On November 4, 1993, — more than two years after the Chapter 11 petition was filed and more than two years after Petitioner was first appointed Chapter 7 trustee — Petitioner commenced an adversary action against Respondents in the United States Bankruptcy Court for the Central District of California alleging fourteen claims for relief. (Pet. App. at 40.)

On January 7, 1994, Respondents filed a Motion to Dismiss based, *inter alia*, on the grounds that nine out of Petitioner's fourteen claims for relief were time-barred

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[2] Unless otherwise indicated, all "section" references herein are to the Bankruptcy Code.

[3] The Bankruptcy Code provides that creditors of a debtor may choose to elect a Chapter 7 trustee at the § 341(a) Meeting. 11 U.S.C. § 702(b) (1996). If the creditors do not so choose, the interim Chapter 7 trustee is deemed trustee. 11 U.S.C. § 702(d) (1996).

by the two-year limitations period in former section 546(a)(1). (Pet. App. at 29.)

On February 9, 1994, the bankruptcy court denied Respondent's Motion to Dismiss. The bankruptcy court issued no opinion, and the order denying Respondents' Motion to Dismiss was filed on February 22, 1994. (Pet. App. at 38.)

On June 13, 1994, the district court reversed the bankruptcy court, finding that seven of the nine claims were time-barred by former section 546(a)(1). *Clark Oil and Trading Co. v. Haberbush (In re Sahuaro Petroleum & Asphalt Co.)*, 170 B.R. 689 (C.D. Cal. 1994).[4] In so ruling, the district court held for Respondents on two separate grounds: (1) that the two-year statute of limitations for avoidance actions commenced upon the filing of the Chapter 11 petition and the entry of an order for relief in the case and did not restart with Petitioner's appointment as Chapter 7 trustee, *id.* at 691-92; and (2) that, even assuming that the limitations period restarted upon Petitioner's appointment, the new two-year limitations period commenced on the date of Petitioner's appointment as interim Chapter 7 trustee, not on the date that the Debtor's creditors failed to elect another individual to replace him. *Id.* at 693.

On August 1, 1994, the district court certified its ruling for interlocutory appeal under 28 U.S.C. § 1292(b), and on September 26, 1994, the court of appeals granted Petitioner leave to appeal interlocutorily.

In a memorandum opinion dated April 29, 1996, the United States Court of Appeals for the Ninth Circuit affirmed the district court's order by stating that the

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[4] The district court remanded to the bankruptcy court for further consideration the question of whether the two remaining claims were also time-barred. *Id.* at 694 n.4.

issue of whether the district court erred by concluding that the limitations period of section 546(a)(1) commenced on the date on which the Debtor filed its Chapter 11 petition and did not restart when Petitioner was appointed as Chapter 7 trustee had been "foreclosed by Ninth Circuit case law." (Pet. App. at 25.) In particular, the Ninth Circuit's decision in *Mosier v. Kroger Co. (In re IRFM, Inc.)*, 65 F.3d 778 (9th Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 1848, 134 L. Ed. 2d 949 (May, 1996) ("*Kroger*"), was on all fours with this case and was controlling. The Ninth Circuit's memorandum opinion contained no discussion of the district court's alternative holding which, as stated above, was based on the conclusion that even if Petitioner received the benefit of a fresh two-year limitations period, the new two-year limitations period commenced as of Petitioner's appointment as interim Chapter 7 trustee, not when the Debtor's creditors failed to elect a different individual to serve as Chapter 7 trustee.

On June 10, 1996, the United States Court of Appeals for the Ninth Circuit denied Petitioner's petition for rehearing and rejected Petitioner's suggestion for rehearing en banc. (Pet. App. at 27.)

SUMMARY OF ARGUMENT

The questions presented by the Petition are not subject to conflicting rulings by United States courts of appeals, and, as a result of the 1994 Amendments to the Bankruptcy Code, they do not present any important issue of federal law requiring the Court's consideration. In sum, there exist no compelling reasons under Supreme Court Rule 10(a) for the Court to grant certiorari in this case. The Petition should be denied.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE PETITION SHOULD BE DENIED AS TO THE FIRST QUESTION PRESENTED BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUITS AND THE ISSUE HAS BEEN RESOLVED BY THE 1994 AMENDMENTS TO THE BANKRUPTCY CODE.

A. There exists no conflict among courts of appeals regarding the first question presented.

Before its amendment in 1994, Bankruptcy Code § 546(a)(1) prescribed a two-year limitations period for avoidance actions filed by a trustee; the statute, however, was silent as to whether this two-year limitations period applied to avoidance actions filed by debtors in possession.[5] In the absence of a clear statutory rule, circuits arrived at conflicting answers concerning the applicability of former section 546(a)(1) to debtors in possession. The Ninth Circuit joined the Second, Third and Tenth Circuits in holding that the two-year limitations period of section 546(a)(1) applied to debtors in

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[5] The Bankruptcy Code provides that in cases where the court does not deem it necessary or appropriate to appoint a trustee to oversee the debtor's operations, the debtor itself, as debtor in possession, may undertake the responsibilities of a trustee. *See* 11 U.S.C. §§ 1107(a), 1108 (1996).

possession.[6] The Fourth and Seventh Circuits held to the contrary.[7]

However, in its section entitled "Questions *Not* Presented For Review," the Petition expressly reads: "this Court is *not* asked to determine whether the limitation period in § 546 applies to debtors in possession." (Pet. at ii (emphasis in original).) Instead, Petitioner asks the Court to consider whether, in those circuits that construe the two-year statute of limitations in former section 546(a)(1) to apply to debtors in possession as well as to appointed trustees, that statute confers upon a Chapter 7 trustee succeeding a debtor in possession an additional two years following conversion of the case to Chapter 7 to bring an avoidance action. The Ninth Circuit squarely answered this question in the negative in the *Kroger* decision, and this Court denied a petition for certiorari. *Mosier v. Kroger Co. (In re IRFM, Inc.)*, 65 F.3d 778, 780-81 (9th Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 1848, 134 L. Ed. 2d 949 (May, 1996). In this case, the Ninth Circuit merely followed its ruling in *Kroger*.

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[6] *See, e.g., Upgrade Corp. v. Government Technology Servs., Inc. (In re Softwaire Centre Int'l, Inc.)*, 994 F.2d 682 (9th Cir. 1993) (holding pre-amendment section 546 applies to debtors in possession); *U.S. Brass and Copper Co. v. Caplan (In re Century Brass Prods., Inc.)*, 22 F.3d 37 (2d Cir. 1994) (same); *Construction Management Servs., Inc. v. Manufacturers Hanover Trust Co. (In re Coastal Group Inc.)*, 13 F.3d 81 (3d Cir. 1994) (same); *Zilkha Energy Co. v. Leighton*, 920 F.2d 1520, 1523-24 (10th Cir. 1990) (same).

[7] *See, e.g., Maurice Sporting Goods, Inc. v. Maxway Corp.*, 27 F.3d 980 (4th Cir.), *cert. denied*, __ U.S. __, 115 S. Ct. 580, 130 L. Ed. 2d 495 (1994) (holding pre-amendment section 546 does not apply to debtors in possession); *Gleishman Sumner Co. v. King, Weiser, Edelman & Bazar*, 69 F.3d 799 (7th Cir. 1995) (same).

Petitioner has failed to cite any conflicting decision by a court of appeals on the first question presented; rather, what Petitioner cites is a series of cases bearing upon precisely the issue "not presented" by the Petition, to wit, whether former section 546(a)(1) should apply to avoidance actions filed by debtors in possession. (*See* Pet. App. 7-18.) In sum, no court of appeals has held contrary to the Ninth Circuit's *Kroger* decision on the issue actually presented by the Petition and, as such, the Court is not faced with any conflict among the circuit courts.

B. In light of the 1994 Amendments to the Bankruptcy Code, the first question presented does not raise an important issue of federal law.

On October 22, 1994, Congress enacted the Bankruptcy Reform Act of 1994 (the "1994 Amendments"), which amended, among other things, section 546(a)(1) to provide that both a trustee and a debtor in possession shall have two years from the filing of the bankruptcy petition to bring an avoidance action, with the proviso that if a first trustee is appointed before the expiration of the second year following entry of the order for relief,[8] such trustee will have one year from appointment to bring an avoidance action. *See* 11 U.S.C. § 546(a)(1) (1996).

As a result of the 1994 Amendments, there is no compelling reason for the Court to review this question because it is relevant only to bankruptcy cases filed before October 22, 1994. While former section 546(a)(1)

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[8] The filing of a bankruptcy petition constitutes entry of the order for relief. 11 U.S.C. § 301 (1996).

continues to apply to cases filed before that date, the number of such cases is diminishing. As to those cases arising after the 1994 Amendments, Congress has set forth clear guidelines. Accordingly, far from presenting an important federal question, the Petition raises issues the resolution of which would have de minimis impact. In light of the fact that the number of cases potentially affected by the issues presented in the Petition is finite and dwindling, the Court should not, under the circumstances, expend its limited time and resources considering them.

II.

THE PETITION SHOULD BE DENIED AS TO THE SECOND QUESTION PRESENTED BECAUSE THE NINTH CIRCUIT NEVER CONSIDERED THE QUESTION; THERE IS NO COURT OF APPEALS DECISION TO REVIEW.

As described above, the Ninth Circuit did not reach the district court's alternative holding that Petitioner's appointment as interim Chapter 7 trustee (as opposed to the § 341(a) Meeting) commenced any separate two-year limitations period available to Petitioner under former section 546(a)(1). Nor has any other court of appeals ever addressed it. Therefore, with regard to the second question, the Court is presented with no court of appeals decision to review. The Court should deny certiorari.

CONCLUSION

In this case, the Ninth Circuit followed its holding in *Kroger* that the two-year statute of limitations for

avoidance actions set forth in former Bankruptcy Code § 546(a)(1) does not start anew where a Chapter 7 trustee replaces a debtor in possession upon conversion of the case from Chapter 11 to Chapter 7. No other circuit recognizing the application of former section 546(a)(1) to debtors in possession has ever held to the contrary. There is no conflict among the circuits on this issue. Further, as a result of the enactment of the Bankruptcy Reform Act of 1994, this is not an important federal question necessitating review. Finally, with regard to the question of whether a limitations period affecting a trustee commences as of the appointment of an interim trustee or as of the § 341(a) Meeting, neither the Ninth Circuit nor any other court of appeals has considered or ruled on this question. There is no court of appeals decision to review.

WHEREFORE, for all the foregoing reasons, Respondents request that the petition for writ of certiorari be denied.

DATED: October 15, 1996.

Respectfully submitted,

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